

June 17, 2015

The Honorable Ronald H. Johnson
Chairman, Committee on Homeland Security & Governmental Affairs
United States Senate
Washington, DC 20510

The Honorable Thomas R. Carper
Ranking Member, Committee on Homeland Security & Governmental Affairs
United States Senate
Washington, DC 20510

Dear Chairman Johnson and Ranking Member Carper:

We are legal scholars in areas of administrative law, regulation, and government. We write to encourage your Committee to give favorable consideration to S. ____, the proposed Independent Agency Regulatory Analysis Act. This bipartisan bill would affirm the President's authority to direct independent regulatory agencies to submit their proposed rules for review by the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget.

The bill builds on a program of regulatory oversight that has its roots in the Carter and Reagan administrations and has been largely stable since the early years of the Clinton administration. OIRA typically raises questions as to whether a proposed rule's benefits justify its costs, whether the rule might be revised to achieve its purposes in better ways, and whether the rule is compatible with other government priorities that might lie beyond the issuing agency's primary field of responsibility. Of course, the alternatives that OIRA may recommend must lie within the rulemaking agency's legal authority and be consistent with statutory requirements. As its continuation over the course of five presidencies of both parties attests, OIRA review has become widely accepted as a normal part of the rule-writing process.

OIRA's review function now covers only executive agencies, and the principal thrust of S. ____ is to affirm the President's authority (which in the view of many, including the Department of Justice, already exists) to extend that review to independent agencies. Such an extension is not radical, nor is it merely a byproduct of current policy debates. Mainstream organizations including the American Bar Association and the Administrative Conference of the United States have been on record as supporting the basic idea for more than two decades.

The essential argument in favor of this extension is that OIRA review improves the underlying analysis and ultimate quality of agency regulations. The signatories have varying levels of enthusiasm for OIRA review as it has been practiced over the years, but we all believe that it can produce important benefits, benefits that have nothing to do with whether the regulator is an executive or an independent agency. No matter what substantive objectives the independent agencies may seek to promote over time, their policy choices should rest on careful analysis of the costs and benefits of their choices as compared with reasonable alternatives. OIRA review has served over the years to induce executive agencies to support their rules with rigorous

analysis. We believe that the quality of independent agencies' analyses – and hence rulemaking – could and would likewise be improved if it were subject to such review.

Extending OIRA review to the independent agencies has been criticized as unduly exposing those agencies to “political” influence. This concern is overstated. OIRA’s most intensive scrutiny under the bill would apply to “economically significant” regulations. The argument that such consequential rulemaking proceedings should be kept “out of politics” is substantially undercut by the fact that members of Congress themselves regularly press their own views on administrators during the creation of those rules, and they would surely resist being asked to refrain from doing so.

There is a strong case for according Presidents a voice in the development of such regulations as well. Voters have valid reasons to expect that by voting for a particular presidential candidate they are, among other things, expressing judgments about the proper scope and direction of regulation in our society. One way of fulfilling that expectation, and similar expectations in future elections, would be to authorize the occupant of the White House at any given time to provide for review and critique of independent agency rulemaking by an office that works directly for him or her. Such review would enable presidential administrations to harmonize competing priorities within the government as a whole, including priorities that, while legally permissible, may diverge from those of an independent regulatory agency that has a more focused mission.

In addition, S. ____ is deliberately written to accommodate the traditional autonomy of the independent commissions. The bill expressly makes OIRA’s assessment “nonbinding.” Under the existing regime, OIRA can return a proposed rule to the originating agency for further consideration; the bill would *not* authorize OIRA to do the same with the proposed rules of independent agencies. The recommendations of the American Bar Association and the Administrative Conference did not contain this accommodation; nor would it be the first choice of all signatories to this letter. The fact remains, however, that, under the bill as written, OIRA’s role would be to furnish a critique. In many instances, presumably, the two bodies would come to agreement about how a rule should be drafted, and the ensuing rule would reflect that agreement. In the event of disagreement, however, the agency would have the right to proceed as it saw fit, just as it does now.

In addition, S. ____ would specifically bar the courts from reviewing whether OIRA and the rulemaking agency have complied with review procedures established by the President. Such preclusion of judicial review has long been an element of the existing process, and the courts have a good track record of respecting this limitation. It is true that, under the terms of the bill, OIRA’s critique of a proposed rule would become part of the rulemaking record and thus would be available to a reviewing court. This could cut two ways, however. If OIRA’s comments were critical, the independent agency would, as a practical matter, need to have answers to the issues OIRA raised. But if OIRA’s comments were supportive, as one would expect they often would be, courts would likely give the agency’s analysis greater weight than they otherwise would have. In either case, the agency would retain the same rulemaking authority it has now.

We are acutely aware that the modern rulemaking process is daunting. Indeed, apart from the debate on S. ____, your Committee should give continuing attention to whether some of the hurdles facing agencies have outlived their usefulness. We believe, however, that a properly structured program for OIRA review of independent agency rulemaking would improve the regulatory process in ways that would justify its burdens.

There is room for debate about ways in which the particulars of S. ____ might be refined as it works its way through the legislative process. But the basic principle behind the bill is good government. We urge your Committee to hold a hearing on the bill and to evaluate it in a positive and constructive spirit.

Sincerely,

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